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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 531

EARL P. COOK, *Appellant*

vs.

BEN W. FORTSON, JR., *as the duly appointed, qualified, and acting Secretary of State of the State of Georgia;*

J. LON DUCKWORTH, *Chairman of the Democratic Executive Committee of the State of Georgia;*

GRACE CANNINGTON, *Secretary of the Democratic Executive Committee of the State of Georgia; and the*

DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA, *an unincorporated association,*

Appellees.

BRIEF OF APPELLANT OPPOSING MOTION OF APPELLEES TO DISMISS OR AFFIRM

To the Supreme Court of the United States:

In their combined Counter-jurisdictional Statement and Motion to Dismiss or Affirm, Appellees make four principal contentions, viz:

1. That the rights of Appellant, sought to be protected, are purely political, and not civil rights.
2. That the imposition of the "county unit" rule in the Democratic Congressional primary election of July 17, 1946, wherein Appellant was denied the right to have his vote counted as cast, was party action and not State action.
3. That the questions are not substantial.
4. That the action is, in effect, one against the State of Georgia, and the State has not consented to be sued.

In opposition to these contentions, counsel for Appellant show:

1. *The right of Appellant, to have his vote counted as cast, in a Congressional election, is a civil right and not a political right.*

Numerous actions at law to redress the deprivation of the right to vote, as a civil right, have been maintained.

The very statute which gives the District Courts jurisdiction of such actions, in law and in equity, to wit, U. S. C. A., Title 28, Sec. 41, Subsection 14, is headed: "*Suits to redress deprivation of civil rights.*"

THE SAME RIGHT IS NOT A CIVIL RIGHT IN LAW AND A POLITICAL RIGHT IN EQUITY.

The members of the Court are familiar with the line of decisions which have held that the right to vote in Congressional elections is secured by Article I, Section 2, of the Constitution, and is protected by the Fourteenth Amendment. Some of the cases so holding, and protecting that Constitutional right either in actions for damages or in criminal proceedings, are:

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EX PARTE SIEBOLD,
100 U. S. 371, 388;

EX PARTE YARBROUGH,
110 U. S. 651, 663;

WILEY v. SINKLER,
179 U. S. 58, 63;

U. S. v. MOSLEY,
238 U. S. 383;

NIXON v. HERNDON,
273 U. S. 536, 541;

NIXON v. CONDON,
286 U. S. 73;

COLEMAN v. MILLER,
307 U. S. 433 (not a Congressional election);

U. S. v. CLASSIC,
313 U. S. 299;

SMITH v. ALLWRIGHT,
321 U. S. 649;

U. S. v. SAYLOR,
322 U. S. 384.

The contention of Appellees here was urged in NIXON v. HERNDON, *supra*, and was disposed of summarily. Mr. Justice Holmes, for the Court, said:

> "The objection that the subject-matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and recovered for in a suit at law hardly has been doubted for over two hundred years, since ASHBY v. WHITE, 2 Ld. Raym. 938, 3 id. 320, and has been recognized by this Court. (cit.) . . ."

Appellant here alleges private damage, by virtue of the failure to count his vote. The right to have his vote counted

is as much protected by the Constitution as is his right to cast a vote.

U. S. v. CLASSIC, *supra;*

SMITH v. ALLWRIGHT, *supra;*

U. S. SAYLOR, *supra.*

He has been deprived of that Constitutional right, as the statute expresses it, "under color of . . . statute," and prays that the statute (and the regulations adopted by virtue of it), be declared to be unconstitutional and void.

Substantially the same relief is prayed in the instant case, to redress the deprivation of a civil right which has resulted in private damage, as was prayed and granted in the political case of

SMILEY v. HOLM,
285 U. S. 355.

In that case, the Court, through Mr. Chief Justice Hughes, described the proceeding as follows:

> "This suit was brought by the petitioner as a 'citizen, elector and taxpayer' of the State *to obtain a judgment declaring invalid all filings for nomination for the office of representative in Congress,* which should designate a subdivision of the State as a congressional district, *and to enjoin the Secretary of State from giving notice of the holding of elections* for that office in such subdivisions." (Emphasis ours.)

The judgment of the State court dismissing the action was reversed, and, in substance, this Court granted the declaratory judgment. And that case was decided before the enactment of the Declaratory Judgment statute.

Buttressed by the Declaratory Judgment Act, and asserting private damage resulting from the deprivation of a Constitutional right, Appellant in the case at bar is entitled to the relief sought.

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See, in this connection:

MITCHELL v. WRIGHT (C.C.A. 5),
154 F. (2d) 924.

II. *The imposition of the "county unit" rule in the Democratic Congressional primary election of July 17, 1946, wherein Appellant was denied the right to have his vote counted as cast, was State action.*

(a) *The State of Georgia requires a primary for the nomination of candidates for members of Congress:*

Code of Georgia, 1933, Sec. 34-3217:

> "Nothing in this law shall be construed to provide or require any definite unit of election for candidates for nominations for members of Congress, judges of the superior courts, solicitors general, members of the General Assembly and county officers; and this law shall not be construed to require a primary for any of the last-named officials, *except in their respective districts,* circuits, or counties, as provided by law. . . ." (Emphasis ours).

(b) *The laws of Georgia do not require any definite unit of election (i.e., whether by popular or "county unit" votes) in primary elections for nomination of candidates for member of Congress, but do require that the political party authorities shall, in all matters not provided for by law, make rules and regulations for holding all primary elections and for making returns thereof.*

Code of Georgia of 1933:

> Sec. 34-3217: "Nothing in this law shall be construed to provide or require any definite unit of election for candidates for nominations for members of Congress . . ."
>
> Sec. 34-3209: "The party authorities *shall,* in all matters not provided for in this Chapter, formulate rules and regulations for holding said primary election and for making returns thereof to the proper party authorities." (Emphasis ours.)

The direction that the "party authorities," not the "party,"

shall make such rules and regulations, is significant. It brings the case squarely within the doctrine of

NIXON v. CONDON,
286 U. S. 73.

The State Democratic Executive Committee failed to exercise the power and duty to fix a unit of election in Congressional primaries, providing, in its rule under which the instant primary was held, as follows:

"VIII.

"Insofar as the Primary relates to the nomination of candidates for Congress from various Congressional Districts, such candidates shall be voted for only in the counties comprising their respective districts; and the Congressional Democratic Committee of each District shall determine whether the county unit or popular vote plan shall prevail."

Whereupon, by resolution (Record, p. 4) the Congressional Democratic Committee for the Fifth Congressional District provided that the "county unit" rule should prevail in the Congressional primary election held July 17, 1946.

The exclusion of Appellant from full participation in said primary, by refusing to count his vote as cast, was State action by the Fifth District Democratic Congressional Committee.

NIXON v. CONDON, *supra*, at page 85:

"Whatever power of exclusion has been exercised by the members of the committee has come to them, therefore, not as delegates of the party, but as delegates of the State. . . . Power so intrenched is statutory, not inherent. If the State had not conferred it, there would be hardly a color of right to give a basis for its exercise."

In imposing the "county unit" rule in the primary under consideration, the Fifth Congressional Committee acted independently of the will of the Democratic State Convention, independently of the will of the State Democratic Executive

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Committee (see Rule VIII, *supra*), and acted, both in law and in fact, as an agency of the State.

NIXON v. CONDON, *supra*, at page 88:

> "The pith of the matter is simply this: that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power. They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established and continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere. They are not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly. . . . The test is not whether the members of the Executive Committee are the representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action."

And see:

U. S. v. CLASSIC, *supra;*

SMITH v. ALLWRIGHT, *supra;*

CHAPMAN v. KING, 154 F. (2d) 460—(C.C.A. 5).

III. *The questions are substantial.*

Not only does Appellant seek relief in his own behalf, but also in behalf of 53,882 electors who voted, as he did, for candidate Helen Douglas Mankin, who received both a plu-

rality and a majority of all votes cast. If mathematics is an aid to a determination of the substantiality of the questions, the case is 53,882 times as important as, for example, was the case of NIXON v. CONDON, supra.

The following excerpt from COLEMAN v. MILLER is apt:

> "Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes. Petitioners come directly within the provisions of the statute governing our appellate jurisdiction. They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege."

This Court has so frequently concerned itself with protecting the right of individuals to vote and to have their vote counted and given effect, that it is inconceivable that the questions here raised may be considered not substantial.

IV. *The action is not against the State of Georgia.*

In PHILADELPHIA CO. v. STIMSON,
223 U. S. 605,

a case challenging the authority of the Secretary of War to do the acts complained of therein, the Court said, at page 620:

> ". . . in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments." (Citing numerous authorities.)

See also:

SMILEY v. HOLM, *supra.*

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Appellant respectfully submits that the motion to dismiss or affirm filed by Appellees should be denied on all grounds and that this Honorable Court should accept and note jurisdiction of this appeal.

Respectfully submitted,

ALEX. W. SMITH

CROOM PARTRIDGE

Counsel for Appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 531

EARL P. COOK, *Appellant-Petitioner*

vs.

BEN W. FORTSON, JR., *as the duly appointed, qualified, and acting Secretary of State of the State of Georgia;*

J. LON DUCKWORTH, *Chairman of the Democratic Executive Committee of the State of Georgia;*

GRACE CANNINGTON, *Secretary of the Democratic Executive Committee of the State of Georgia; and the*

DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA, *an unincorporated association,*

Appellees-Respondents.

NOTE: There being no printed Record before the Court to which counsel may refer, such references are omitted; in all other respects, counsel have endeavored to comply with the rules of this Court.

THE OPINION OF THE COURT BELOW

The opinion of the Court below is not yet reported, but, together with its judgment, is set out as an Appendix to STATEMENT AS TO JURISDICTION filed by Appellant herein.

GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

I. The right of a duly qualified elector, a citizen of the United States, to vote for a Member of Congress, and to have his vote counted as cast, is secured by Article I, Section II, of the Constitution of the United States, as a private right.

II. Pursuant to power conferred upon the authorities of political parties by the State of Georgia by virtue of certain statutes, the State of Georgia, acting through a Democratic political party committee for the Fifth Congressional District of Georgia, imposed the "county unit" method of counting votes in a Democratic primary election for Member of Congress, held July 17, 1946. Said "county unit" system is designed arbitrarily to discriminate, and does so discriminate against Appellant and the members of his class.

III. By said State action, the vote of Appellant, a qualified elector, cast in said primary, was not counted as cast, but was counted only as a small fraction of a vote, contrary to Article I, Section II, of the Constitution of the United States and Amendment XIV thereto.

IV. Appellant brought his action for a Declaratory Judgment, to declare the aforementioned statutes of the State of Georgia to be unconstitutional, and the party rule imposing the "county unit" system in said election, to have the force of law and to be unconstitutional and void for the reasons above asserted, and for injunctive relief. The relief prayed was denied. (For details of rulings made, see *Specifications of Error, infra.*)

V. The statutory provisions under which jurisdiction is invoked are as follows:

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The Supreme Court of the United States has jurisdiction of this cause upon appeal by virtue of the fact that it is a direct appeal under Sec. 266 of the Judicial Code as amended (U.S.C.A., Title 28, Sec. 380), and allowed under Sec. 238 of the Judicial Code as amended (U.S.C.A., Title 28, Sec. 345). The complaint was brought under the provisions of U.S.C.A., Title 28, Sec. 41, sub-sec. 14, and the prayers are for a Declaratory Judgment and for further relief by way of a writ of injunction, pursuant to Judicial Code, Sec. 274d (U.S.C.A., Title 28, Sec. 400).

VI. A few of the cases believed to sustain the jurisdiction of this honorable Court are:

WILEY v. SINKLER, 179 U.S. 58, 63;

NIXON v. CONDON, 286 U.S. 73;

COLEGROVE v. GREEN, 90 L. ed. 1212.

STATEMENT OF THE CASE

Earl P. Cook, as a qualified voter, brought his action against Ben W. Fortson, Jr., as Secretary of State of Georgia; J. Lon Duckworth, Chairman of the Democratic Executive Committee of the State of Georgia; Grace Cannington, Secretary of said Committee, and said Committee, for a Declaratory Judgment, and for additional relief by injunction, alleging that the rules of the said Democratic Executive Committee and of the Fifth District Congressional Democratic Committee imposed the "county unit rule" of election in a Democratic Congressional Primary held July 17, 1946; that said rules constituted a part of the election system under the laws of the State of Georgia, and had the force of law, and praying the Court to declare said rules, and the statutes requiring or permitting the same, to be utterly unconstitutional and void, and to enjoin the defendants from certifying as the winner in said Primary any candidate save the candidate who received the plurality and majority of all votes cast therein, for that said statutes and rules abridged the right and privilege of Appellant, and of each member of his class, to vote in said Congressional primary election, for a candidate for Member of Congress, upon substantially an equal basis with each other elector in said Congressional District, for that the said "county unit rule" discriminates, arbitrarily, against the electors of Fulton County, in said District. Appellant alleged that his right to cast an entire vote, and to have that vote counted, is secured to him and to the members of his class by Article I, Section 2, of the Constitution of the United States and guaranteed against abridgment or discrimination by Amendment XIV thereto.

Appellant alleged, in substance, that the State of Georgia, by statute, delegated to the Democratic Party authorities, the option and discretion to provide whether a primary election of said party should be held under the popular vote rule or under the "county unit" rule, and that, in imposing the "county unit" rule in the Congressional primary above mentioned, the Congressional Democratic Committee intended to and did exercise the discretion and option vested in it by law.

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The "county unit rule," required by statute to be applied in primaries for many offices, and authorized by statute to be applied in Congressional primaries, is stated in the Code of Georgia, 1933 (Sec. 34-3212), as follows:

> "Candidates for nominations . . . who receive, respectively, the highest number of popular votes in any given county shall be considered to have carried such county, and shall be entitled to the full vote of such county on the county unit basis, that is to say, two votes for each representative to which such county is entitled in the lower House of the General Assembly. . . ."

As illustrating and demonstrating the discrimination against himself and members of his class resulting from the application of the "county unit rule" in the aforementioned Congressional primary, Appellant set out the following summary of statistics relative to the three counties comprising the Fifth Congressional District of Georgia:

County	Population (1940 Census)	Number of State Representatives	Number of County Unit Votes
Fulton	392,886	3	6
DeKalb	86,648	3	6
Rockdale	7,724	1	2

Appellant alleged that, under the "county unit rule," as applied to three said counties upon the basis of comparative populations, each elector of Rockdale County was entitled to one full vote, while each elector of DeKalb County was entitled to .2667 of a vote, and each elector of Fulton County was entitled to only .0589 of a vote.

Appellant showed to the specially constituted three-judge court that he voted in said primary election for Helen Douglas Mankin, who received both a plurality and a majority of all votes cast therein, and showed the consolidated vote in said primary to have been as follows:

	Popular Vote	Unit Vote	Number Counties
James C. Davis	43,162	8	2
Capt. Wyman C. Lowe	7,510	0	0
Helen Douglas Mankin	53,882	6	1

He showed that, notwithstanding the election of Helen Douglas Mankin by popular vote, the authorities of the Democratic Party and the Secretary of State threatened to place upon the official ballot for use in the General Election to be held November 5, 1946, as a candidate of said party, the name of James C. Davis, who received only 43,162 of the 104,554 popular votes cast in said primary election, but who nevertheless received eight of the fourteen "county unit" votes provided by the rules of the Congressional Democratic Committee under authority of law.

Upon the trial and hearing of said cause, it was shown that the names of both Helen Douglas Mankin and of James C. Davis had been, by the authorities of the Democratic Party, certified to the Secretary of State as candidates of said Party, and that, *pendente lite* (and within four days prior to the date set for the hearing), the Secretary of State had so certified both names to the Ordinaries of the counties comprising the Fifth Congressional District. (NOTE: It is the duty of said Ordinaries to place on the official ballot for the General Election the names of candidates certified to them by the Secretary of State.) [Code § 40-601 as amended by Acts 1946 (see appendix).]

Notwithstanding such certification, James C. Davis entered an appeal to the State Convention of the Democratic Party, held October 9, 1946, from the aforementioned certification by the authorities of the Party to the Secretary of State, and the said Convention has declared that Mrs. Mankin is not a candidate of the Democratic Party, and her name has been removed from the ballot, despite the fact that she received a majority and plurality of the popular votes cast in the primary.

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The three-judge District Court held in substance that the case was controlled by the decision of this Court in COLEGROVE v. GREEN, 90 L. ed. 1212, that the issues presented in the instant case were of a political nature, and therefore not proper for judicial determination. Injunctive relief was denied.

SPECIFICATION OF ERRORS

1. Error is specified on the failure of the District Court to grant a Declaratory Judgment, as prayed. (Assignments of Error, I.)

2. Error is specified on the failure and refusal of the District Court to issue and grant an interlocutory injunction, as prayed. (Assignments of Error, II.)

3. Error is specified on the failure of the District Court to hold and adjudge that the rules of the Democratic Party pointed out in the Complaint, are a part of the election machinery of the State of Georgia, and have the force of law. (Assignments of Error, V.)

4. Error is specified on the failure of the District Court to hold that the right to vote for a Member of Congress is a right and privilege secured to Appellant by Article I, Section II, of the Constitution of the United States, and guaranteed against infringement and discrimination by Amendment XIV thereto. (Assignments of Error, VI.)

5. Error is specified upon the failure of the District Court to hold and adjudge that the laws of the State of Georgia, and the rules of the Democratic Party providing for a primary election under the county unit rule, complained of herein, abridge the privilege of Appellant to vote for a Member of Congress, and that they deny to Appellant the equal protection of the laws, in violation of the Fourteenth Amendment. (Assignments of Error, VII.)

6. Error is specified on the failure of the District Court to hold and adjudge that Appellant, under and by virtue of Article I, Section II, of the Constitution of the United States, and Amendment XIV thereto, had the right to vote in the

Democratic primary election held July 17, 1946, and to have his vote counted, on a substantially equal basis with the vote of every other qualified elector voting in said election within the Fifth Congressional District of Georgia. (Assignments of Error, VIII.)

7. Error is specified on the finding and decision of the District Court, as a Conclusion of Law, that:

> "We think the case is controlled in principle by the decision on June 10, 1946, in Colegrove v. Green, 90 L. ed. 1212, and that equity should grant no relief, but leave any redress that may be due for the inequalities complained of to the action of the State Legislature, or of Congress."
> (Assignments of Error, IX.)

8. Error is specified on the finding and decision of the District Court, as a conclusion of law, the following:

> "We greatly doubt that the county unit rule here complained of can be said to be imposed on a congressional primary by the State at all, so as to bring the Fourteenth Amendment into operation."
> (Assignments of Error, X.)

9. Error is specified on the finding and decision of the District Court, as a conclusion of law, the following:

> "If the county unit be imposed in congressional primaries it is by party action, not state action."

10. Error is specified on the finding and decision of the District Court, as a conclusion of law, as follows:

> "But at last as matters now stand, the county unit rule is not being applied by anyone. The State Executive Committee has refused to apply it and has certified both candidates, and both are on the ballots which are being printed, and every Democrat is free to vote for his choice, and the popular vote will determine in the general election. The plaintiff and those he represents will get exactly what they claim they should have."
> (Assignments of Error, XII.)

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11. Error is specified on the finding and decision of the District Court, as a conclusion of law, as follows:

> "At present we see nothing that ought to be enjoined, even if that remedy be available in such a case as this." (Assignments of Error, XIII.)

SUMMARY OF THE ARGUMENT

Points I, II: The District Court had jurisdiction, and the Supreme Court of the United States has jurisdiction on appeal, of this cause.

Points III, IV: The right to vote for Members of Congress is secured to qualified electors by Article I, Section II, of the Constitution of the United States, is guaranteed against infringement or discrimination by Amendment XIV, and is a personal right.

Points V, VI: By law, the State of Georgia requires a primary election in each Congressional District for nominating candidates for Members of Congress, but does not provide for any definite unit of election therein (i.e., whether by popular or "county unit" votes).

Point VII: By law, the State of Georgia requires that the political party authorities shall, in all matters not provided by law, make rules and regulations for holding all primary elections and for making returns thereof.

Points VIII, IX: No higher authority of the Democratic Party having exercised the right delegated by the State to fix a definite unit of election for the Congressional primary election held July 17, 1946, the Congressional Democratic Committee for the Fifth Congressional District provided that the "county unit rule" should prevail therein.

Point X: The adoption of the "county unit rule" in said election by said Committee, in the exercise of power delegated by the State, and required by statute to be exercised, was State action, had the force of law, and abridged Appellant's right to vote for a Member of Congress, secured by Article I, Section II, of the Constitution.

Point XI: By adopting the "county unit rule" for said election, a committee of eighteen thwarted the will and choice of a plurality and a majority of the electors of said Congressional District.

Point XII: The State of Georgia supervises, and collab-

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orates in, the holding of all primary elections, and has adopted the party primary as a part of the public election machinery.

Point XIII: The holding of said Congressional primary election was the action of the State of Georgia, acting through the Congressional Democratic Committee for said District.

Point XIV: The "county unit rule" is designed arbitrarily to discriminate, and by virtue thereof the State of Georgia and the Democratic Party do so discriminate, against the electors of Fulton County, in favor of the electors of Rockdale County and of DeKalb County.

Points XV, XVI: Such discrimination deprives Appellant of the right to vote and to have his vote counted on substantially an equal basis with electors of other counties in said Congressional District, is a private wrong to Appellant, and is in violation of both the "privileges and immunities" clause, and the "equal protection" clause, of the Fourteenth Amendment.

Points XVII-XIX: The District Court had the right and duty to grant Appellant a Declaratory Judgment, and injunctive relief, as prayed.

1. *The District Court had jurisdiction of the parties and of the subject-matter in this cause.*

Plaintiff asserted a right to vote for a Member of Congress, and to have his vote counted upon a basis of substantial equality with every other vote cast in his Congressional District. Such right, he alleged to be secured to him by the Constitution of the United States (Article I, Section II), and to be guaranteed by Amendment XIV thereto.

The Constitution provides:

Article III:

> "Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *

"Section 2. The judicial Power shall extend to all Cases, in law and equity, arising under this Constitution, * * *"

The complaint was brought under the provisions of U.S. C.A., Title 28, Sec. 41, sub-section 14, to redress the deprivation of civil rights.

The relief sought was that authorized by Judicial Code, Sec. 274d (U.S.C.A., Title 28, Sec. 400), to wit, a Declaratory Judgment and further relief by way of a writ of injunction, both temporary and permanent.

Injunction being sought to restrain the operation of State statutes upon the ground of the unconstitutionality thereof, a three-judge District Court was convoked, in conformity with Judicial Code, Section 266, as amended (U.S.C.A., Title 28, Sec. 380), one of said Judges being the Senior Circuit Judge for the Fifth Circuit. The required notice was given to the Governor and to the Attorney-General of the State of Georgia.

II. *The Supreme Court of the United States has jurisdiction in this cause on this appeal.*

An interlocutory injunction having been denied, after notice and hearing, the Supreme Court has jurisdiction of this cause on this appeal by virtue of

Judicial Code, Sec. 266, as amended (U.S.C.A., Title 28, Sec. 380);

Judicial Code, Sec. 238, as amended (U.S.C.A., Title 28, Sec. 345);

(See appendix for pertinent quotations.)

And see:

WILEY v. SINKLER, 179 U.S. 58, 65;

NIXON v. CONDON, 286 U.S. 73;

COLEGROVE v. GREEN, 90 L. ed. 1212.

III. *The right to vote for Members of Congress is conferred by Article I, Section II, of the Constitution of the United*

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States, upon citizens of the United States, who are qualified, according to State law, to vote for the popular branch of their State legislature.

Article I, Section 2:

> "The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature."

In EX PARTE YARBROUGH, 110 U.S. 651, it was decided that the Constitution adopts the State qualification as the federal qualification for the voter; but that his right to vote is based upon the Constitution and not upon the State law. Interestingly enough, EX PARTE YARBROUGH was an original proceeding to inquire into the jurisdiction of the United States Circuit Court for the Northern District of Georgia, the District from which this appeal is brought. In that case, this Court, in a unanimous opinion delivered by Mr. Justice Miller, said:

> "But it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States.
>
> "The office, if it be properly called an office, is created by that Constitution and by that alone. It also declares how it shall be filled, namely, by election. Its language is: (Quoting Article I, Section 2.)
>
> "The States, in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualifications for voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress.

> "It is not true, therefore, that electors for members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively on the law of the State."

The Court cited an earlier case, in which had been discussed the mutual interests of both the State and National governments in the proper election of members of Congress, viz:

EX PARTE SIEBOLD, 100 U.S. 371.

The doctrine of EX PARTE YARBROUGH, supra, was adhered to in

WILEY v. SINKLER, 179 U.S. 58, 62,

where the Court prefaces the same language as is above-quoted from the Yarbrough Case with the following statement:

> "The right to vote for members of the Congress of the United States is not derived merely from the Constitution and laws of the State in which they are chosen, but has its foundation in the Constitution of the United States."

Again, in the recent case of

UNITED STATES v. CLASSIC, 313 U.S. 290,

this Court has followed the ruling in EX PARTE YARBROUGH, *supra*, and the following language, appearing at page 314, is apt:

> "Interference with the right to vote in the Congressional primary in the Second Congressional District for the choice of Democratic candidate for Congress is thus, as a matter of law and in fact, an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance, since it is at the only stage when such interference could have any practical effect on the ultimate result, the choice of the Congressman to represent the district. The primary in Louisiana is an integral part of the proce-

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dure for the popular choice of Congressman. The right of qualified voters to vote at the Congressional primary in Louisiana and to have their ballots counted is thus the right to participate in that choice.

"We then come to the question whether that right is one secured by the Constitution. Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states by electors, the qualifications of which it prescribes. The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the Constitution, is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right."

More recently, EX PARTE YARBROUGH, *supra*, and the CLASSIC CASE, *supra*, have been followed, in

SMITH v. ALLWRIGHT, 321 U.S. 649, 661:

"It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution."

IV. *The right to vote for Members of Congress, secured by the Constitution, is guaranteed against abridgment or discrimination by Amendment XIV to the Federal Constitution. It is a personal right.*

The language of Mr. Justice Holmes, in a unanimous decision in

NIXON v. HERNDON, 273 U.S. 536, 540,

is apposite, and seems to settle the matter. Of a statute of the State of Texas, forbidding negroes to take part in a Democratic primary election in that State, the Court said:

"The important question is whether the statute can be sustained. But although we state it as a question the

answer does not seem to us open to a doubt. We find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth. That Amendment, while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them. (cit.) That Amendment 'not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws. . . . What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States . . .?' "

See also:

NIXON v. CONDON, 286 U.S. 73, at 89.

V. *The laws of Georgia require a primary election in the several Congressional Districts of the State, for the nomination of candidates for Members of Congress.*

Code of Georgia of 1933, Sec. 34-3217:

"Limitations.—Nothing in this law shall be construed to provide or require any definite unit of election for candidates for nomination for members of Congress, judges of the superior courts, solicitors general, members of the General Assembly and county officers; and this law shall not be construed to require a primary for any of the last-named officials, *except in their respective districts*, circuits or counties, as provided by law: Provided, however, that primaries for nomination of members of Congress, judges of the superior courts, solicitors general and members f the General Assembly shall be held on the date named in section 34-3212 for primaries for United States Senator, Governor, Statehouse officers, Justices of the Supreme Court and Judges of the Court of Appeals. (Acts 1917, p. 189.)" (Emphasis ours.)

VI, VII. The laws of Georgia do not require any definite

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unit of election (i.e., whether by popular or "county unit" votes) in primary elections for nomination of candidates for member of Congress, but do require that the political party authorities shall, in all matters not provided for by law, make rules and regulations for holding all primary elections and for making returns thereof.

Code of Georgia of 1933 (dealing with the county unit vote law):

> "Sec. 34-3217. *Limitations.*—Nothing in this law shall be construed to provide or require any definite unit of election for candidates for nominations for members of Congress, . . ."
>
> "Sec. 34-3209. *Party authorities may formulate additional rules.*—The party authorities *shall*, in all matters not provided for in this Chapter, formulate rules and regulations for holding said primary election and for making returns thereof to the property party authorities." (Emphasis ours.)

Necessarily, in using the phrase "party authorities," the General Assembly of Georgia intended to confer upon some officers or agency of the Party, rather than upon the Party Convention itself exclusively, the power and duty to formulate rules and regulations governing the holding of primary elections. As will be shown, the State Democratic Executive Committee so construed the statute. (See the following subdivision.)

That this was a delegation of power to the party authorities is demonstrated in

NIXON v. CONDON, 286 U.S. 73, q.v.

VIII. *Insofar as concerns the Congressional primary election here under attack, neither the officers of the State Democratic Party, nor the State Democratic Executive Committee, nor any other higher authority of said Party exercised the power, delegated by the State to fix a definite unit of election therein, but the State Executive Committee left the exercise of that power and duty to the respective Congressional Democratic Committee in each District.*

We quote from the rules and regulations of the State Democratic Executive Committee of Georgia, adopted May 2, 1946, under which this primary election was held:

"VIII.

"Insofar as the Primary relates to the nomination of candidates for Congress from various Congressional Districts, such candidates shall be voted for only in the counties comprising their respective districts; and the Congressional Democratic Committee of each District shall determine whether the county unit or popular vote plan shall prevail."

IX. *The Congressional Democratic Committee for the Fifth Congressional District, by resolution, provided that the "county unit rule" should prevail in the primary election held July 17, 1946.*

We quote from the resolution adopted by said Committee on May 3, 1946:

"4. A candidate receiving a plurality of the votes cast in a county shall be entitled to the unit vote for said county and the candidate receiving a majority of the county unit votes cast in said primary in said District shall name delegates from each County in the District to a convention of delegates to be held in the City of Atlanta, Georgia, on Saturday, July 27, 1946, at 11 o'clock A.M. in the Senate Chamber of the State Capitol. The delegates so appointed shall go to the convention and declare as the nominee the candidate who receives a majority of the County Unit votes cast in said primary.

"The number of delegates from each county shall be twice the number of representatives which said county has in the House of Representatives of Georgia.

"When said delegates have assembled in convention, they shall organize by the election of such officers as such convention may deem necessary and shall then proceed to declare as the nominee for Congress from the Fifth Congressional District the candidate receiving the majority of the County Unit votes cast in the primary."

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X. *Said resolution by the Congressional Democratic Committee for the Fifth District, having been adopted in the exercise of power conferred by the State and required by statute to be exercised, is State action, has the force of law, and abridges the right to vote for Members of Congress, secured by Article I, Section 2, of the Constitution of the United States.*

In principle, the instant case is controlled by the decision in

NIXON v. CONDON, 286 U.S. 73.

There the Court had under consideration a statute of Texas which authorized the State Executive Committee of a political party to prescribe the requisites of party membership. Holding that such power is inherent in the State convention of a party, and not in any committee, the Court said:

> "Whatever power of exclusion has been exercised by the members of the committee has come to them, therefore, not as the delegates of the party, but as the delegates of the State. * * * Power so intrenched is statutory, not inherent. If the State had not conferred it, there would be hardly color of right to give a basis for its exercise." (286 U.S. 73, at 85.)

That the Fifth District Congressional Democratic Committee undertook, in the case at bar, to exclude Appellant and members of his class from casting an entire vote, instead of undertaking to exclude them from Party membership, does not distinguish this case from that of NIXON v. CONDON. Independent of the will of the Democratic State Convention, and expressly declared to be independent of the will of the State Executive Committee by Rule VIII thereof, *supra*, the Fifth District Congressional Committee of the Party acted, both in law and in fact, as an agency of the State.

Appellant's contention is summed up, clearly and succinctly, in NIXON v. CONDON, *supra*, at page 88:

> "The pith of the matter is simply this, that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power. They

are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere. They are not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matter of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly. * * * The test is not whether the members of the Executive Committee are the representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action."

And see:

U. S. v. CLASSIC, *supra;*

SMITH v. ALLWRIGHT, *supra.*

XI. *The said Congressional Democratic Committee for the Fifth District is composed of fourteen members and three officers; said Committee, by adopting the "county unit rule" for the Congressional Primary election held July 17, 1946, thwarted the will and choice of both a plurality and a majority of the electors of said Fifth Congressional District.*

The tremendous power vested in this little oligarchy of seventeen is delineated graphically by the returns. Here follows the consolidated vote in the Democratic primary presently under attack:

FROM THE FIFTH CONGRESSIONAL DISTRICT

	Popular Vote	Unit Vote	Number Counties
James C. Davis	43,162	8	2
Capt. Wyman C. Lowe	7,510	0	0
Helen Douglas Mankin	53,882	6	3
	104,554	14	3

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Having received both a plurality and a majority of all votes cast, Mrs. Mankin, nevertheless, received the unit vote only of Fulton County. Notwithstanding that 53,882 electors of 104,554 voting, chose Mrs. Mankin as *the* nominee of the Democratic Party for Member of Congress from the Fifth District, James C. Davis, under the "county unit rule," received the nomination. *Quod Erat Demonstrandum.*

It was only as a matter of grace, and because of a violation by the Congressional Committee of a rule of the State Executive Committee, that a Contest Committee certified Mrs. Mankin's name as a candidate, along with the name of James C. Davis. Appellees herein contend that such certification was not final, since the Democratic State Convention held October 9, 1946, declared that Mrs. Mankin was not a nominee, and to remove her name from the ballot.

XII. *The State of Georgia supervises, and collaborates in, the holding of all primary elections, and has adopted the party primary as a part of the public election machinery.*

The statutes of Georgia regulating primary elections have been considered by the Fifth Circuit Court of Appeals, and the decision of that Court coincides in most respects with the contentions of Appellant here. We refer to the case of

CHAPMAN v. KING, 154 F. (2d) 460.

In discussing the participation of the State in party primaries, the Court says:

> "But the State of Georgia has not left party primaries wholly to the various parties, but has recognized the practical potency of the party pledge and the great importance to the public of the results of a primary held by a numerous party, and has protected and regulated such primaries almost exactly in the same way as it has regulated elections by the people. Much, perhaps most, of this regulation we think in no wise commits the State to the party practices. . . .
>
> "But there are features of the Georgia laws which seem to us to show that the State, when any party calls

a primary, associates itself with the party in holding it, and adopts the result as authenticating the successful candidate to be the nominee of that party for the official election ballot. The State collaborates in these ways: It prohibits anyone to participate in any primary or convention of any political party who is not a qualified voter. Georgia Code § 2-608, Constitution, Art. II, Sec. I, Par. 8. The State furnishes its list of registered voters and these voters alone are declared entitled to vote in primaries as well as in general elections. Georgia Code § 34-405. And the State registrars are required to be at the court house during the voting hours of the primary as fixed by law § 34-2001a, to make corrections in the list, § 34-411 (Supplement). The State requires the party to select election managers, and requires each manager to take an oath that he will fairly and impartially and honestly conduct the election according to the provisions of law. § 34-3201. If a voter is challenged, they are required to administer to him an oath that he is duly qualified to vote '*according to the rules of the party*, and according to the election laws of this State.' § 34-3202. All the laws in reference to the qualification of voters and their registration are applied to primaries, and 'No person who is not a duly qualified and registered voter according to law and *who is not also duly qualified in accordance with the rules and regulations of the party holding the same*, shall be entitled to vote at any such primary election.' § 34-3218. If the challenged voter swears falsely, the State will punish him. § 34-9925. No one but a sworn manager can have any part in receiving or counting the votes. § 34-3205. The managers must turn over tally sheets, lists of voters, ballots and other election papers to the Clerk of the Superior Court to be kept under seal until the next grand jury meets if no contest is filed. § 34-3207. The managers are indictable for violation of their duty. §§ 34-9922, 34-9923. Generally all penal laws touching elections are extended to primaries, § 34-9933, Supplement; and § 34-9907.

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"Further, by the Act of 1917, Sections 34-3212 to 34-3218, the State has undertaken to control the method of determining who has been nominated in a primary for United States Senator, Governor, Statehouse officers and Justices of the Supreme Court and Court of Appeals, these being statewide elections, by saying that neither a majority nor a plurality of all votes cast shall nominate, but that a plurality of the votes in each county shall carry that county, and a majority of "county units" carried as therein defined, shall determine the nominee; and if no candidate carried a majority of the county units and there are but two candidates the one who received a majority of the popular votes shall be the nominee; but if there are more than two candidates and neither carried a majority of the county unit votes, there shall be a second primary between the two leading candidates whose result is to be determined on the same basis; with other elaborate provisions on further contingencies. This Act appears in large measure to take such primaries out of the control of the parties initiating them, and to substitute the State's will in determining the mode of choice of the party nominee. It is the Act which specifically declares that no one may vote who is not qualified according to the rules of the party. § 34-3218.

"We think these provisions show that the State, through the managers it requires, collaborates in the conduct of the primary, and puts its power behind the rules of the party. It adopts the primary as a part of the public election machinery. The exclusions of voters made by the party by the primary rules become exclusions enforced by the State and when these exclusions are prohibited by the Fifteenth Amendment because based on race or color, the persons making them effective violate under color of State law a right secured by the Constitution and laws of the United States within the meaning of the statute which is here sued on."

It should be borne in mind that the opinion from which the above excerpt is quoted was not written with particular

reference to election of a Member of Congress, and that, therefore, the Court probably overlooked Sec. 34-3217, above quoted, which does require a primary in each Congressional District. Nor did the Court comment upon the fact that the State empowers the party authorities to impose the "couny unit rule" in elections where it is not, by statute, required to be imposed.

See also:

NIXON v. CONDON, *supra;*

U. S. v. CLASSIC, *supra;*

SMITH v. ALLWRIGHT, *supra.*

XIII. *The holding of the Congressional primary election of July 17, 1946, in the Fifth Congressional District, was the action of the State of Georgia, by and through a committee of the Democratic Party, consisting of fifteen members and three officers.*

Counsel believe that this proposition has been demonstrated by the arguments and authorities under subdivisions X and XII, *supra.*

XIV. *The "county unit rule" is designed arbitrarily to discriminate, and by virtue thereof the State of Georgia and the Democratic Party, do so discriminate, against the citizen-electors of Fulton County, in favor of the citizen-electors of Rockdale County and of DeKalb County.*

The "county unit rule" imposed by statute in numerous primaries, and by the Fifth District Congressional Democratic Committee in the primary under attack (though different language was used in the latter case), is found in Code of Georgia, Sec. 34-3212, to wit:

> "Candidates for nominations to the above-named offices who receive, respectively, the highest number of popular votes in any given county shall be considered to have carried such county, and shall be entitled to the full vote of such county on the county unit basis, that is to say, two votes for each representative to which such

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county is entitled in the lower House of the General Assembly. . . ."

This litigation does not attack, *per se*, the apportionment among the several counties of Georgia of representatives in the lower house of the legislature of that State. But, when, by statute, or under the authority of statute, the apporionment is made the basis of the "county unit rule," it must be scrutinized for discriminatory features. The apportionment statute presently effective is (Code of Georgia of 1933, 1945 Supplement, Sec. 47-101), to wit:

> "47-101. *House of Representatives; membership apportioned.*—The membership of the House of Representatives shall be as follows: Three members each from the counties of Fulton, Chatham, Bibb, Richmond, DeKalb, Muscogee, Floyd, Troup; two members each from the counties of Cobb, Carroll, Laurens, Thomas, Colquitt, Hall, Lowndes, Burke, Gwinnett, Sumter, Ware, Bulloch, Walker, Clarke, Bartow, Polk, Coweta, Washington, Emanuel, Decatur, Mitchell, Spalding, Baldwin, Meriwether, Coffee, Glynn, Upson, Whitfield, Worth, Dougherty; and one member each from each of the other counties of the State."

Even a superficial glance at the Census of 1940 reveals the fact that the apportionment among the larger Counties of representatives in the lower House of the General Assembly, is not "according to their respective numbers," but is purely arbitrary.:

Fulton County, with a population of 392,886, has 3 representatives.

Chatham County, with a population of 117,960, has 3 representatives.

Bibb County, with a population of 83,783, has 3 representatives.

Richmond County, with a population of 81,863, has 3 representatives.

DeKalb County, with a population of 86,942, has 3 representatives.

Muscogee County, with a population of 75,494, has 3 representatives.

Floyd County, with a population of 56,141, has 3 representatives.

Troup County, with a population of 43,879, has 3 representatives.

Troup County, with a population approximately one-ninth that of Fulton County, has equal representation with the latter county in the General Assembly, and an equal number of unit-votes in Statewide elections.

More directly, the picture for the Fifth Congressional District is as follows:

County	Population	Number of State Representatives	Number of County Unit Votes
Fulton	392,886	3	6
DeKalb	86,942	3	6
Rockdale	7,724	1	2

Upon the basis of population of the respective counties, therefore, while each qualified elector is entitled to one full vote, each qualified elector of DeKalb County is entitled to .2667 of a vote, but each qualified elector of Fulton County is entitled only to .0589 of a vote.

Can it be imagined that such gross discrimination is unintentional? Is a qualified elector, whose vote is deprived of .9411 of its weight and effectiveness, appreciably better off than a qualified elector who is denied his right to vote at all?

When the Constitution was adopted, slavery being an established institution, it was provided (Article I, Section 2, Par. 3) that, for the purpose of apportioning Representatives in Congress among the several states "according to their respective numbers," a slave should be considered as three-fifths of a free person; and yet, in the year of our Lord 1946, and in

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the year of our Independence the 171st, when a qualified voter of Fulton County, Georgia, comes to vote for such Representative, he is regarded as .0589 of an elector.

In these circumstances, the citizens of the small rural County of Rockdale may not truthfully say with "Mr. Dooley":

> "Ivrything that's worth havin' goes to th' city; th' counthry takes what's left."

XV. *This discrimination, contrary to Amendment XIV of the Federal Constitution, deprives Appellant of a personal right—the right to vote, and to have his vote counted, on substantially an equal basis with electors residing in other counties of said Congressional District, and is a private wrong to Appellant.*

The discriminatory features of the "county unit" system have been discussed in the preceding subdivision of this brief. That such discrimination is in contravention of the Fourteenth Amendment has already been demonstrated, IV, *supra.*

That the right of an elector to have his vote counted is included in his right to vote, is a proposition sustained both by reason and by the authorities.

In UNITED STATES v. MOSLEY, 238 U.S. 383, 386, the Court say:

> "We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box."

The last-cited case was quoted and followed in

UNITED STATES v. SAYLOR, 322 U.S. 384.

There, in discussing the *Mosley case*, the Court say:

> "The conclusion was that Sec. 19 protected personal rights of a citizen including the right to cast his ballot, and held that to refuse to count and return the vote as cast was as much an infringement of that personal right as to exclude the voter from the polling place. The case

affirms that the elector's right intended to be protected is not only that to cast his ballot but that to have it honestly counted."

Exclusion from the polling place is a private wrong.

NIXON v. HERNDON, *supra.*

Again, in

UNITED STATES v. CLASSIC, *supra*, at page 315:

"Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution." (cit.)

See also:

SMITH v. ALLWRIGHT, *supra.*

Counsel submit that a system of counting ballots is not honest which deprives the ballots cast in one county in the District of a large percentage of their weight and effectiveness, while giving to ballots cast in another county in the same District full weight and effect.

As appears from the foregoing authorities, this is not a case like that of COLEGROVE v. GREEN, *supra*, where it was said:

"The basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity."

The districting of the State of Georgia is not here attacked. If the Fifth Congressional District as now constituted is a gerrymander, then Appellant complains of a gerrymander within a gerrymander, which operates directly upon the individual elector. The wrong here complained of may be judicially corrected.

The case of

McPHERSON v. BLACKER, 146 U.S. 1,

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which is more similar to COLEGROVE v. GREEN, *supra*, than to the case at bar (and which dealt with the election of Presidential electors by districts), is authority here on the contention of Appellant as to discrimination within the Congressional District. At page 40, the Court said:

> "If presidential electors are appointed by the legislatures, no discrimination is made; *if they are elected in districts where each citizen has an equal right to vote the same as any other citizen, no discrimination is made. . . .*"

To the contention urged there, as here, that "the subject-matter of the controversy is not of judicial cognizance" because "political in their nature," the Court, at page 23, replied:

> "But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such constitution and laws, and its validity sustained."

XVI. *This discrimination against Appellant and the members of his class, by virtue of the "county unit rule" and the statutes of the State of Georgia, is in violation of both the "privileges and immunities" clause, and the "equal protection" clause, of the Fourteenth Amendment to the Federal Constitution.*

That the right to vote in a Congressional election is a "privilege," as that word is used in the "privileges and immunities" clause of the Fourteenth Amendment, is beyond question. It has been held by this Court to be a "personal right." The words "right" and privilege" are used in the Constitution and the Amendment as synonyms.

See:

SLAUGHTER HOUSE CASES, 16 Wall. 36, 77.

This right to vote has been protected as a "right or privilege."

EX PARTE YARBROUGH, *supra;*

NIXON v. HERNDON, *supra;*

UNITED STATES v. CLASSIC, *supra.*

That the "county unit rule" is in violation of the "equal protection" clause seems too clear for argument. As was said in

NIXON v. HERNDON, *supra,*

"States may do a good deal of classifying that it is difficult to believe rational, but there are limits . . ."

and counsel insist that the discrimination against electors residing in Fulton County exceeds all bounds of rationality. It is purely arbitrary.

Cf. GATES v. LONG, 113 S.W. (2d) 388,

where the Supreme Court of Tennessee struck down a "county unit" statute as being arbitrarily discriminatory, and unconstitutional.

The specious argument that the "county unit" system of counting votes follows the pattern established by the Constitution for the apportionment of Senators among the States, and that of the Electoral College, ignores the history of the Federal Convention and the *raison d'etre* of such Constitutional provisions.

It seems hardly necessary to remind the Court that the Delegates to the Convention represented Sovereign States, each jealous of its sovereignty. They were conscious of the thought, later expressed by John Randolph, that: "Asking one of the States to surrender part of her sovereignty is like asking a lady to surrender part of her chastity." The larger States contended for "a participation in the government, fully proportioned to their superior wealth and importance," while the smaller States insisted upon the degree of equality which they enjoyed under the Articles of Confederation.[1]

In this situation, and faced with the almost impossible task

[1] *The Records of the Federal Convention of 1787*, Farrand, Vol. III, p. 243, from *The Federalist*, (Madison).

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of reconciling these diverse interests and jealousies, the delegates at last brought forth a design for government so magnificent as to defy description, and arouse the awe and reverence of succeeding generations.

The whole plan and purpose of the equality of representation in the Senate, and of the Electoral College, is explained in a few words by James Madison, in a letter to Thomas Jefferson.

> "The Senate will represent the States in their political capacity; the other House will represent the people of the States in their individual capacy (*sic*). The former will be accountable to their constituents at moderate, the latter at short periods. The President also derives his appointment from the States, and is periodically accountable to them.[2]

Thus was the integrity of each State, as a polity, preserved by equality of representation in the Senate and equality of voice in the appointment of a President; the interests of the people were safeguarded by apportionment of Representatives among the several States, "according to their respective numbers."[3]

To compare to this sublime compromise, whereby the rights of all are secured, the invidious "county unit" system (which has injustice for its sole object, and which interposes an oligarchy between the electors and the choice of their representative in the councils of the Republic) is rank impertinence.

XVII. *The District Court had the right and duty to grant the plaintiff a Declaratory Judgment as prayed.*

A primary election was held, as alleged, to determine which of three candidates should be the sole candidate of the Democratic Party for Member of Congress from the Fifth

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[2] Farrand, *supra*, III, p. 134. And see *McPherson v. Blacker*, 146 U.S. 1, 27, *et seq.*

[3] Constitution, Art. I, Sec. 2, Par. 3; and see: *Authorship of the Constitution of the United States*, Senate Document No. 787, 62d Congress, 2d Session, at pages 54, 56.

Congressional District of Georgia. That such nomination is equivalent to election is a matter of general knowledge. One candidate, for whom Appellant voted, received both a plurality and a majority of all votes cast in said primary election. Under color of a statute of the State of Georgia which empowers the authorities of a political party to impose the "county unit" rule in Congressional elections, Appellant was deprived of his right to have his ballot counted as cast, and the candidate for whom he voted was not declared the sole nominee of said party for said position. Pursuant to the Declaratory Judgment statute, Appellant brought his suit to have declared unconstitutional said statute of the State of Georgia, as well as all rules and regulations adopted by the Democratic Party authorities imposing the "counti unit rule" under authority thereof, and to enjoin the placing on the ballot for the forthcoming general election the name of any candidate than the one who received the majority of votes cast in said primary. In short, the action was one by a qualified elector to protect his franchise.

The right to bring such action is recognized by statute (U.S.C.A., Title 8, Sec. 43), and jurisdiction to entertain the same is conferred expressly upon the District Courts (U.S. C.A., Title 28, Sec. 41, sub-sec. 14).

The language of the Court in

COLEMAN v. MILLER, 307 U.S. 433, 438,

is apposite:

> "Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think the senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes. . . . They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege."

In the case at bar, Plaintiff-Appellant is the representative

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of 53,882 electors, whose votes "have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient" to nominate the candidate for whom they voted. Plaintiff-Appellant, for himself and the members of his class has "set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect," and the State, acting through the authorities of the Democratic Party, "has denied that right and privilege."

COLEMAN v. MILLER, *supra*,

was an action for mandamus, which, while it is classed as a legal remedy, is granted or withheld upon equitable principles.

EX PARTE SKINNER & EDDY CORP.,
265 U.S. 86, 96.

While, as held in

NIXON v. HERNDON, *supra*,

private damage caused by outright denial of the right to vote may be recovered for in a suit at law, it is submitted that no remedy at law is adequate to protect the rights of Appellant and those he represents.

The case of

SMILEY v. HOLM, 285 U.S. 355,

provides ample authority for the granting of equitable relief in cases of this character. Though brought before the enactment of the Federal Declaratory Judgment Act, it was, in substance, a proceeding for a declaratory judgment and injunctive relief. In support of his right to equitable relief, Appellant here alleges all that was alleged in SMILEY v. HOLM, *supra*, plus "private damage." In the latter case,

> "The bill sought to have all filings for nominations declared illegal"

and to enjoin the Secretary of State from acting under an allegedly void law.

In the case at bar, Appellant seeks to have declared unconstitutional certain statutes, and certain party rules and regulations adopted thereunder, and to enjoin the Secretary of State from acting under those void laws, as well as to have declared illegal the nomination of any candidate for Member of Congress except the one who received the majority of the votes cast in the nominating primary.

It is respectfully submitted that the laws and rules complained of are unconstitutional, and that it was the duty of the District Court so to declare.

XVIII, XIX. *The District Court had the right and duty to grant the plaintiff an interlocutory injunction as prayed, and to grant a permanent injunction as prayed.*

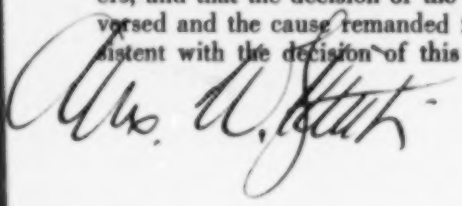
Upon the grounds urged in the preceding subdivision, and under authority of

SMILEY v. HOLM, *supra*,

it is respectfully insisted that the District Court was under the duty to grant injunctive relief as prayed.

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that the decision of the District Court should be reversed and the cause remanded for further proceedings consistent with the decision of this Court.



ALEX. W. SMITH
CROOM PARTRIDGE
Counsel for Appellant.

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APPENDIX

Pertinent statutes of the State of Georgia. References are to Code of Georgia of 1933 (annotated), and to 1945 Pocket Part Supplements thereto:

Constitution of the State of Georgia as amended (Acts of 1945, page 8, et seq.):

ARTICLE II, SEC. I:

Paragraph I:

"Elections by the people shall be by ballot, and only those persons shall be allowed to vote who have been first registered in accordance with the requirements of law.

Paragraph II:

"Every citizen of this State who is a citizen of the United States, eighteen years old or upwards, not laboring under any of the disabilities named in this Article, and possessing the qualifications provided by it, shall be an elector and entitled to register and vote at any election by the people: Provided, that no soldier, sailor or marine in the military or naval services of the United States shall acquire the rights of an elector by reason of being stationed on duty in this State.

Paragraph III:

"To entitle a person to register and vote at any election by the people, he shall have resided in the State one year next preceding the election, and in the county in which he offers to vote six months next preceding the election.

Paragraph IV:

"Every citizen of this State shall be entitled to register as an elector, and to vote in all elections in said State,

who is not disqualified under the provisions of Section II of Article II of this Constitution, and who possesses the qualifications prescribed in Paragraphs II and III of this Section, or who will possess them at the date of the election occurring next after his registration, and who in addition thereto comes within either of the classes provided for in the two following subdivisions of this paragraph.

"1. All persons who are of good character and understand the duties and obligations of citizenship under a republican form of government; or,

"2. All persons who can correctly read in the English language any paragraph of the Constitution of the United States or of this State and correctly write the same in the English language when read to them by any one of the registrars, and all persons who solely because of physical disability are unable to comply with the above requirements but who can understand and give a reasonable interpretation of any paragraph of the Constitution of the United States or of this State that may be read to them by any one of the registrars."

Section VI, Paragraph I.

RETURNS MADE TO WHOM. Returns of election for all civil officers elected by the people, who are to be commissioned by the Governor, and also for members of the General Assembly, shall be made to the Secretary of State, unless otherwise provided by law.

ARTICLE III

Section III, Paragraph I.

NUMBER OF REPRESENTATIVES. The House of Representatives shall consist of representatives apportioned among the several counties of the State as follows:

To the eight counties having the largest population, three representatives each; to the thirty counties having the next largest population, two representatives each; and to the remaining counties, one representative each.

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Section IX, Paragraph II.

ELECTION, WHEN. The first election for members of the General Assembly, under this Constitution, shall take place on Tuesday after the first Monday in November, 1946, and subsequent elections biennially, on that day, until the day of election is changed by law.

* * * *

34-3201. (127) HOW ELECTIONS CONDUCTED; OATH OF MANAGERS. Every political primary election held by any political party, organization, or association, for the purpose of choosing or selecting candidates for office, or the election of delegates to conventions in this State, shall be presided over and conducted in the manner and form prescribed by the rules of the political party, organization, or association holding such primary elections, by managers selected in the manner prescribed by such rules. Such managers shall, before entering upon the discharge of their duties, each take and subscribe an oath that he "will fairly, impartially, and honestly conduct the same according to the provisions of the law providing how primary elections shall be held in this State, and in accordance with the laws of this State governing regular elections for the offices of this State." Should one or more of the managers thus appointed to hold such elections fail to appear on the day of election, the remaining manager or managers shall appoint others in their stead and administer to them the oath herein prescribed. The managers shall take the oath before a notary public or other officer authorized to administer oaths; but if no such officer can be conveniently had, the managers may administer the oath to each other. The oath, after being made and subscribed, shall be filed in the office of the clerk of the superior court of the county in which the primary election shall be held, within five days after an election. (Acts 1890-1, p. 210.)

34-3202. (128) EXHIBITION AND LOCKING OF BALLOT BOX; COUNT OF VOTES; CERTIFICATION OF RESULTS. Before any ballots are received at such primary elections, and immediately before opening the polls, the managers

shall open each ballot box to be used in the election, and shall exhibit the same publicly, to show that there are no ballots in the box. They shall then close and lock or seal the box, except the opening to receive the ballots, and shall not again open the same until the close of the election. They shall keep a list of voters voting at the election, and shall, before receiving any ballot, administer to the voter an oath, provided the voter's vote is challenged, that he is duly qualified to vote according to the rules of the party, and according to the election laws of this State, and that he has not voted before in such primary election then being held. At the close of the election the managers shall proceed publicly to count the votes and declare the result. They shall certify the result of the election, and transmit the certificate with the tally sheet or poll list, together with the ballots cast, and all other papers relating to such primary election, within the time and in the manner prescribed in this Chapter. (Acts 1890-1, p. 210.)

34-3203. (129) TIME FOR HOLDING ELECTION. Whenever any political party shall hold primary elections for nomination of candidates for office, such party or its authorities shall cause all candidates for nominations for Governor, Statehouse officers, members of Congress, United States Senators, judges of the superior courts, justices of the Supreme Court, judges of the Court of Appeals, solicitors general and members of the General Assembly to be voted for on one and the same day throughout the State at such date as may be fixed by the State executive committee of such party, except where a second primary shall have been called by the authorities of such party for any particular office on some subsequent day, through failure to make, for any cause, a valid nomination at the first primary, or in consequence of a contest; Provided, that said executive committee shall not fix the date for the said general primary earlier than 60 days before the date of the general State election in November: Provided further, that this section shall not have the effect of requiring a primary for judges and solicitors except in their respective circuits, or for members of the General Assembly except in their respective counties, or for State senators except in their counties, as the authorities of said party may authorize or direct. (Acts 1908, p. 55.)

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34-3204. (130) WHERE ELECTOR SHALL VOTE. No elector shall vote in any such primary election in a militia district other than the one in which he resides, or, if he resides in a city, in a ward other than the one in which he resides, if an election precinct shall be located in such ward. (Acts 1908, pp. 55, 56.)

34-3205. (131) OATH OF MANAGER, WHEN TO BE TAKEN. No person who has not first taken the oath prescribed by law for managers of primary elections shall act as manager, clerk, or assistant or in any way take part in receiving, counting, or consolidting the votes or results in any such primary election, and no manager of any primary election shall permit any person who has not first taken the oath now prescribed by law for the managers of primary elections, to act as assistant or clerk or in any way take part in receiving, counting, or consolidating the votes or results in any such primary election. (Acts 1908, pp. 55, 56.)

34-3206. (132) ELECTOR'S NAME MUST BE ON REGISTRATION LIST. No manager of any such primary election shall receive the ballot of any elector until he has first ascertained that the name of such elector appears upon the registration list furnished for such election by the registrars, or filed by them in the office of the clerk of the superior court of the county in which the primary election shall be held, and upon the receipt of such ballot the name of the elector voting shall be checked or marked on said list. (Acts 1908, pp. 55, 56.)

34-3207. (133) RETURNS OF MANAGERS, HOW FILED AND CONTROLLED. The returns of the managers, with the tally sheets, lists of voters, and ballots, together with all papers connected with said election, shall be filed in the office of the clerk of the superior court of the county in which said election shall be held, within four days after the final declaration of the result thereof. One of the lists of the voters and one of the registration lists with names of those checked or marked as voters shall be exhibited by said clerk to anyone desiring to inspect same, but the other documents deposited as aforesaid shall be kept unopened and under seal until the

next meeting of the grand jury, to which grand jury one registration list, one list of voters, and the checked registration list above mentioned shall be exhibited; and if no action shall be taken thereon by the grand jury and no contest shall have been filed within the time prescribed by the authorities of said party, all of said election papers shall be destroyed. (Acts 1890-1, p. 210; 1908, pp. 55.56.)

34-3208. (134) OFFICIAL BALLOT SHALL BE PROVIDED. The persons authorized by the rules of the party, organization, or association to hold such primary election shall provide an official ballot whereon shall be printed all the names of the candidates for the various offices hereinbefore named. (Acts 1908, pp. 55, 57.)

34-3209. (135) PARTY AUTHORITIES MAY FORMULATE ADDITIONAL RULES. The party authorities shall, in all matters not provided for in this Chapter, formulate rules and regulations for holding said primary election and for making returns thereof to the proper party authorities. (Acts 1908, pp. 55, 57.)

34-3210. (136) TIME AND PLACE OF ELECTION; RETURNS; DECLARATION OF RESULT. Every such primary election shall be held at the time and place, and under the regulations prescribed by the rules of the party, organization, or association holding the same, and the return shall be made and the result declared as prescribed in this Chapter. (Acts 1890-1, p. 210; 1900, p. 40; 1908, p. 56.)

34-3211. (137) CONTESTS. When a contest is filed on the ground of illegal votes, any of which it is claimed on affidavit can probably be proved to be illegal by resort to the ballots, specifying what ballots, it shall be the duty of the clerk of the superior court to deliver the same, together with all papers connected with said primary election, to the person or persons who shall preside at the taking of the testimony in such contested election, upon demand, who shall examine said suspected ballots and none other. (Acts 1900, pp. 40, 41.)

34-3212. COUNTY UNIT VOTE. Whenever any political party shall hold primary elections for nomination of candi-

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dates for United States Senator, Governor, Statehouse officers, justices of the Supreme Court, and judges of the Court of Appeals, such party or its authorities shall cause all candidates for nominations for said offices to be voted for on one and the same day throughout the State, which is hereby fixed as the second Wednesday in September of each year in which there is a regular general election. Candidates for nominations to the above-named offices who receive, respectively, the highest number of popular votes in any given county shall be considered to have carried such county, and shall be entitled to the full vote of such county on the county unit basis, that is to say, two votes for each representative to which such county is entitled in the lower House of the General Assembly. If in any county any two or more candidates shall tie for the highest number of popular votes received, the county unit vote of such county shall be equally divided between the candidates so tying. All such county unit votes shall within 10 days after such primary be accurately consolidated by the chairman and secretary of the State committee of the political party holding such primary, and published in a newspaper published at the Capital, within three days after the completion of the consolidation, certified under the hands and seals of said chairman and secretary; and the candidates for said offices, respectively, who shall receive a majority of all the county unit votes, throughout the entire state, upon the basis above set forth, shall be declared by the State convention of the party holding such primary, or the permanent chairman thereof, or other party authority, without the necessity of a formal ballot, to be the nominee of such party for the above-named offices, respectively, and it shall be the duty of the State executive committee elected or appointed at such convention, or by its authority, or the chairman or secretary thereof, or other authority of such party, to see to it that the names of all such successful candidates shall be placed upon the tickets or ballots of such party at the general election following such primary, and such successful candidates shall be considered, deemed and held as the duly nominated candidates of such party for the offices named: Provided, that in the event there are only two candidates for any particular office referred to in this section, and it shall appear,

after the consolidation of all of the county unit votes throughout the State, that said candidates have received an equal number of county unit votes, the one who shall have received a majority of the popular votes shall be declared by the State convention of the party holding such primary, or the permanent chairman thereof, or other party authority, without the necessity of a formal ballot, to be the nominee of such party for such office; and it shall be the duty of the State executive committee elected or appointed at such convention, or by its authority, or the chairman or secretary thereof, or other authority of such party, to see to it that the name of such successful candidate shall be placed upon the tickets or ballots of such party at the general election following such primary, and such successful candidate shall be considered, deemed and held as the duly nominated candidate of such party for the office named: Provided, further, that if no convention of such party shall be called or held, the declaration of the result shall be made in such manner as may be prescribed by the State committee or other authority of such party. (Acts 1917, pp. 183, 184.)

* * * *

34-3216. EXPENSES; PAYMENT. The expense of holding such primary elections shall be paid by the political party which causes the same to be held. (Acts 1917, p. 189.)

34-3217. LIMITATIONS. Nothing in this law shall be construed to provide or require any definite unit of election for candidates for nominations for members of Congress, judges of the superior courts, solicitors general, members of the General Assembly and county officers; and this law shall not be construed to require a primary for any of the last-named officials, except in their respective districts, circuits or counties, as provided by law: Provided, however, that primaries for nomination of members of Congress, judges of the superior courts, solicitors general and members of the General Assembly shall be held on the date named in section 34-3212 for primaries for United States Senator, Governor, Statehouse officers, justices of the Supreme Court and judges of the Court of Appeals. (Acts 1917, p. 189.)

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34-3218. LAWS OF FORCE. All the laws in reference to the qualification of voters and their registration shall apply to said elections, and no person who is not a duly qualified and registered voter according to law and who is not also duly qualified in accordance with the rules and regulations of the party holding the same, shall be entitled to vote at any such primary election. (Acts 1917, p. 189.)

34-3215a. CERTIFICATE OF RESULT OF ELECTION. Immediately after the consolidation of the votes in any such primary election a certificate showing the names of such candidates and the offices for which they are candidates, shall be filed in the office of the Secretary of State of this State; such certificate to be signed by the chairman and secretary of the State committee of the political party holding such primary. Said certificate shall show by counties the total number of popular votes and the county unit votes received by each candidate in any such primary election. (Acts 1943, p. 347.)

34-3223. RECOUNT OF BALLOTS: INTENT AND PURPOSE OF LAW. The legislative intent and purpose of this law is to effectuate fair and honest primary elections for the nomination of candidates for public office in this State. (Acts 1941, pp. 432, 433.)

34-3224. SAME, CANDIDATES AS TO WHOM LAW IS APPLICABLE. The provisions of this law shall apply to all primary elections hereafter held in this State by any political party for the purpose of nominating candidates for Governor, Statehouse officers, members of the General Assembly, members of Congress, judges of the superior courts, justices of the Supreme Court, judges of the Court of Appeals, solicitors general and county officers, and all such primary elections hereafter held for the nomination of any candidate for State, county, district or rational office required to be filled by election by the people of this State or any part thereof, whether such primary election be held to nominate candidates for unexpired terms or full terms. (Acts 1941, pp. 432, 433.)

(Here follow Sections 34-3225 through 34-3236, outlining recount procedure in detail.)

34-3608. TIME FOR FILING NOTICE OF CANDIDACY IN GENERAL ELECTION; TIME OF HOLDING PRIMARIES AND CONVENTIONS. In order to allow more adequate time for the participation of members of the military in elections and party primaries, the following provisions are enacted in lieu of those now provided by law:

1. All candidates for national and state offices, or the proper authorities of the political party nominating them, shall file notice of their candidacy, giving their names and the offices for which they are candidates, with the Secretary of State, at least 90 days prior to the regular election. All candidates for district and county offices either by themselves or by the proper authorities of the party nominating them, shall file notice of their candidacy with the ordinary of the county at least 90 days before the regular election.

2. Whenever any political party shall hold primary elections for nomination of candidates for office for Governor, Statehouse officers, members of Congress, United States Senators, judges of the superior courts, justices of the Supreme Court, judges of the Court of Appeals, solicitors general, and members of the General Assembly, which are by law voted on one and the same day throughout the State, said primary may be held on such date as may be fixed by the State executive committee of such party, and the State executive committee is authorized to fix such time for the said primary, second primary, or party convention as it may determine without respect to the time now provided by law as the date on which the said primary, second primary, or convention shall be held. (Acts 1944, Ex. Sess., pp. 2, 4.)

34-1904. BALLOTS IN ELECTION OTHER THAN PRIMARY ELECTIONS. In all elections other than primary elections held under the auspices of a political party, it shall be the duty of the ordinary to provide and furnish at the expense of the county, and in case of purely municipal elections, at the expense of the municipality, official ballots for all such elections, having printed thereon, in separate columns, the

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names of the candidates of each political party, designating the names of the political party to which they belong, and also the names of any other candidates for the offices to be filled at said election; and in case of election for President and Vice President of the United States, the names of the candidates for such offices may be added with the electors and party designation: Provided, however, it shall not be the duty of said officers to place the names of any candidates on said official ballots, unless notice of their candidacy shall be given in the following manner, to wit: All candidates for national and State offices, or the proper authorities of the political party nominating them, shall file notice of their candidacy, giving their names and the offices for which they are candidates, with the Secretary of State, at least 30 days prior to the regular election, except in cases where a second primary election is necessary: Provided, further, that such candidate shall also file a petition for that purpose signed by not less than five per cent. of the registered voters in that territory or that such political party shall have cast no less than five per cent. of the votes in the last general election next preceding for the election of such officer; but nothing in this proviso shall be construed as applying to special elections. The names of such candidates shall be filed with the Secretary of State as soon as possible after the determination of the result of said second primary. All candidates for district and county offices, either by themselves or by the proper authorities of the party nominating them, shall file notice of their candidacy with the ordinary of the county at least 15 days before the regular election, and all candidates for municipal offices shall file notice of their candidacy, either by themselves or by the proper authorities of the party nominating them, with the mayor or other chief executive officer of the municipality at least 15 days before the regular election. In the event of the resignation or death of any nominee of any political party prior to the regular election, at which the name of said nominee is to appear on the official ballot, said vacancy in nomination shall be filled in such manner as may be determined by the proper authorities of such party. Said officers shall also have printed on said ballots such language as may be necessary for the voters to express their desires as to any

question or matter which may be submitted at any such election. In all other particulars said ballots shall be arranged, printed, and prepared for regular elections as provided in section 34-1903. (Acts 1922, p. 100; 1943, p. 292.)

ACTS 1946 (approved Feb. 1, 1946), amending Code Section 40-601, par. 7.

Section 3. That in lieu of paragraph 7 of said Section 40-601 of the Code of Georgia of 1933 a new paragraph to be known as paragraph 7, is hereby enacted to read as follows: "The Secretary of State shall furnish each Ordinary of the State the form of official ballot, all blank forms, including tally sheets, blank lists of voters, forms of returns, certificates and directions to be used in all elections for United States Senate, Governor, electors of President and Vice-President of the United States, representatives to Congress, Secretary of State, State Treasurer, Comptroller General, Attorney General, State Superintendent of Schools, Supreme Court (Court) of Appeals, judges of the Superior Court, Solicitor General, Public Service Commission, Commissioner of Labor, members of the General Assembly, and county officers. The Secretary of State shall certify to the respective Ordinaries the names of all candidates for national and state offices who have qualified as such as provided in Section 34-1904 of the Code of Georgia and in case there are one or more persons purporting to represent the same political party or candidate it shall be the duty of the Secretary of State to determine such an issue. The Ordinaries of the respective counties shall not be required to add any other names for national and state offices on the official ballot except upon certificate of the Secretary of State.

CODE SECTION 34-2101. (94.) PROVISIONS GOVERNING ELECTIONS OF MEMBERS OF GENERAL ASSEMBLY APPLICABLE TO CERTAIN ELECTIONS IN CERTAIN PARTICULARS. Elections for Governor, Members of Congress, United States Senators, electors for President and Vice President, State Treasurer, Comptroller General, and Attorney General, shall be governed by the same rules as those governing the elections for members of the General Assembly, in the following particulars:

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1. Oaths to be taken by the voters.

2. Class of persons to hold the election and the oath to be taken by them.

3. Places and the time of day to hold them.

4. Manner of conducting and returning them, including all special elections, and in the duty of the clerks of the superior courts and the grand juries.

5. Several penalties attached to the managers or other persons.

6. Furnishing of blanks by the Governor.

7. In all other respects where applicable, and there is not a contrary provision of law.

CODE SECTION 34-1303 (9) (Pocket Part 1945).
MANNER OF CONDUCTING ELECTIONS

9. CONSOLIDATION AND RETURNS TO SECRETARY OF STATE. The managers to consolidate the vote of the county shall consist of all those who officiated at the county site, or a majority of them, and at least one from each precinct. They shall make and subscribe two certificates, stating the whole number of votes each person received in the county; one of them, together with one list of voters and one tally sheet from each place of holding the election, shall be sealed up and without delay mailed to the Secretary of State; the other, with like accompaniment, shall be directed to the clerk of the superior court of the county and be by him deposited in his office. After the clerk of the superior court has retaned same for the period required by law, he shall transmit same to the tax collector or tax commissioner, as the case may be, for his records. Each of said returns shall contain copies of the original oaths taken by the managers of the courthouse and precinct. (Acts 1921, p. 91; 1945, pp. 129, 135.)

U. S. C. A., TITLE 28, SEC. 345.

Section 345. (JUDICIAL CODE, SECTION 238.) APPELLATE JURISDICTION FROM DECREES OF UNITED STATES DISTRICT COURTS. A direct review by the Su-

preme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections or parts of sections and not otherwise:

(1) Section 29 of Title 15, and section 45 of Title 49.

(2) Section 682 of Title 18, where the decision of the district court is adverse to the United States.

(3) Section 380 of this title.

(4) So much of sections 47 and 47a of this title as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

(5) Section 217 of Title 7. (Mar. 3, 1911, c. 231, section 238, 36 Stat. 1157; Jan. 28, 1915, c. 22, section 2, 38 Stat. 804; Feb. 13, 1925, c. 229, section 1, 43 Stat. 938.)

U. S. C. A., TITLE 28, SEC. 380.

(JUDICIAL CODE, SECTION 266, AMENDED.) SAME; ALLEGED UNCONSTITUTIONALITY OF STATE STATUTES; APPEAL TO SUPREME COURT. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such applica-

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tion as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: PROVIDED, HOWEVER, That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: PROVIDED, That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to

the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit. (June 18, 1910, c. 309, Section 17, 36 Stat. 557; Mar. 3, 1911, c. 231, Section 266, 36 Stat. 1162; Mar. 4, 1913, c. 160, 37 Stat. 1013; Feb. 13, 1925, c. 229, Section 1, 43 Stat. 938.)

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